Nos. 90-954, 90-1004

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,

Petitioners,

-against-

INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,

Respondents.

(caption continued on following page)

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

VICTOR A. KOVNER,
Corporation Counsel of
The City of New York,
Attorney for Amicus Curiae
The City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1035 or 1064

LEONARD J. KOERNER,*
FAY LEOUSSIS,
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

April 15, 1991

*Counsel of Record.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,

Petitioner,

-against-

INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Nos. 90-954, 90-1004

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,

Petitioners,

-against-

INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,

Respondents.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,

Petitioner,

-against-

INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,

Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York is under permanent injunctions in several federal class-action civil rights lawsuits. The City also is a defendant in other such lawsuits and must choose in those cases whether to negotiate a consent decree or litigate the issues. The City therefore has a very great interest in the standard to be applied by the federal courts on applications to modify permanent injunctions in class-action civil rights lawsuits.

In addition, in the present case, as we understand the Sheriff's request for relief, the Sheriff seeks one thing, double-celling in certain cells, for one reason, an unanticipated increase in population. Although we would by no means characterize as simple the issues here, in fact requests for modifications of injunctions in federal class-action civil rights litigation often

present considerably more complex circumstances and arguments both for and against the relief requested. For example, the City has been under injunctions involving conditions at Riker's Island, a jail for pretrial detainees. After a trial in 1976-77, the City stipulated that conditions were unconstitutional and that the population of 1350 constituted unconstitutional overcrowding. In 1980 the plaintiffs moved for an order setting a population cap well below that figure. In order to set a population cap, the District Court considered intervening improvements in conditions. In other words, although it was undisputed that 1350 was overcrowded under conditions at the time of the 1976-77 trial, to determine what constituted unconstitutional overcrowding in 1980 the District Court was required to examine all the changes in conditions between 1976-77 and 1980.

Benjamin v. Malcolm, 495 F Supp 1357 (SDNY, 1980). This obviously constituted a factual inquiry almost as broad as the original trial on the merits.

Another example is provided by Jose P. v. Sobol, 79 C 270 (EHN) (EDNY). In that case and two related cases plaintiffs claim that the New York City Board of Education is violating the rights of handicapped students under federal and New York State statutes. The District Court has entered numerous orders, both on consent and after litigated motions, requiring the parties to negotiate a resolution of the issue of how the Board should evaluate the needs of handicapped students. This has led to almost-weekly meetings of teams of attorneys and educators on both sides that, we believe, have produced little or no progress at substantial cost. In 1989 the plaintiffs' attorneys spent over 2,000 billable hours in

these meetings for which they received well over $300,000 in attorneys' fees from the Board. In 1990 the newly-appointed Schools Chancellor moved to modify all previous orders in order to provide for a six-month moratorium on such meetings so that the Chancellor's staff might devote its time not to meeting, and preparing to meet, with plaintiffs but rather to producing a comprehensive proposal to be submitted at the end of that time. Deciding such a motion involves consideration of every conceivably relevant fact and circumstance and application of a great deal of judgment.

What the City hopes to add to the Court's consideration of this case is some indication of the extraordinarily varied and complex contexts in which motions for modification of injunctions arise in federal class-action civil rights litigation. This Court has never directly addressed the

standard to be applied by the District Courts when deciding such motions. This Court's ruling herein will have enormous consequences outside the context of whether the consent decree here will be modified to permit double-celling in an ultramodern facility. Just as they have looked to United States v. Swift & Co., 286 US 106 (1932), the lower federal courts will look to the Court's decision herein for a standard to be applied to all motions to modify consent decrees and litigated injunctions in class-action civil rights litigation.

SUMMARY OF ARGUMENT

The lower federal Courts have struggled with Swift, and the question of whether the standard applied in that case is applicable in federal class-action civil rights cases. However, we submit that it is plain from the language of Swift and this Court's subsequent discussions of Swift that this

Court did not announce in that case a "grievous wrong" standard to be applied to every application to modify an injunction in the federal Courts. The lower federal Courts have struggled with Swift because they have sought to find in that case a standard of general application. This Court should hold in this case that requests for modification of injunctions in federal class-action civil rights cases may be granted, in the District Court's discretion, whenever there has been a material change of fact or law or increased experience with the facts has yielded a better understanding of how to remedy the violation at issue.

In Point II we address several arguments that plaintiffs often make in opposition to motions by defendants for modification of injunctions in federal class-action civil rights cases. Chief among these is the argument that a higher standard

should apply when the injunction was the product of consent and not a litigated motion. We argue that this and the other arguments analyzed do not withstand analysis.

POINT I

BECAUSE MANY LOWER FEDERAL COURTS, INCLUDING THE TWO COURTS HERE, ARE UNDER THE ERRONEOUS IMPRESSION THAT THERE IS A "SWIFT STANDARD" THAT MAY OR MAY NOT APPLY IN FEDERAL CLASS-ACTION CIVIL RIGHTS LITIGATION, THIS COURT SHOULD HOLD THAT MODIFICATION WILL LIE WHEN THERE IS ANY MATERIAL CHANGE IN LAW OR FACT OR WHEN INCREASED EXPERIENCE WITH THE FACTS YIELDS A BETTER UNDERSTANDING OF HOW THE CONSTITUTIONAL OR STATUTORY VIOLATION SHOULD BE REMEDIED.

(A)

We submit that this Court did not intend to establish, in United States v. Swift & Co., supra, 286 US 106, a strict standard to be applied to all requests for modification of permanent injunctions and that those

Courts of Appeals that have held Swift not applicable in federal class-action civil rights cases, creating instead a new, "flexible" standard for such cases, are correct. See Heath v. DeCourcy, 888 F2d 1105, 1110 (6th Cir, 1989) ("We agree with those circuits and hold that in the area of institutional reform litigation, consent decrees arrived at by mutual agreement of the parties involved are subject to a lesser standard of modification than that dictated by Swift."); see also Plyler v. Evatt, 846 F2d 208, 211-12 (4th Cir), cert. denied, 488 US 897 (1988); Ruiz v. Lynaugh, 811 F2d 856, 861 (5th Cir, 1987); Keith v. Volpe, 784 F2d 1457, 1460 (9th Cir, 1986).

As we explain below, we believe that Swift did not attempt to set forth a standard to be applied to every request to modify a permanent injunction in the federal courts. Even if Swift were thought ambiguous in this

respect, this Court's subsequent decisions make quite plain that Swift announced a standard to be applied when, as in Swift, the factual circumstances have changed very little, if at all, since the injunction was entered.

In Swift this Court stated that an injunction may be modified if changed circumstances have turned the injunction into an "instrument of wrong" and that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 US at 114-15, 119. But this Court also said, before making the statements quoted above, id. at 114 (citations omitted):

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully

> accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

In addressing the merits of the motion for modification, this Court concluded that the defendants, who sought to modify an antitrust decree against them, were still in a position to commit the evils that the injunction had been designed to prevent. This Court stated, id. at 119:

> Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression.

Thus, although this Court did not say so in so many words, this Court considered that case to be one involving "rights fully

accrued upon facts so nearly permanent as to be substantially impervious to change" and not an injunction "provisional and tentative." Id. at 114. See Newman v. Graddick, 740 F2d 1513, 1520 (11th Cir, 1984); Nelson v. Collins, 659 F2d 420, 423-24 (4th Cir, 1981) (en banc).

Ten years later, in Chrysler Corp. v. United States, 316 US 556 (1942), this Court considered a modification request by the government, as plaintiff, in a civil antitrust case. Citing Swift, this Court said, 316 US at 562:

> We think that the test to be applied in answering [the] question [of whether the District Court abused its discretion in granting the request] is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. United States v. Swift & Co., 286 US 106.

This Court then affirmed the District Court's decision to modify the injunction by substituting "January 1, 1943" for "January

1, 1941" as the date Chrysler would be relieved of certain restrictions if the government had not prevailed in a similar lawsuit against General Motors. 316 US at 563-64. Thus, this Court did not apply the "grievous wrong" standard applied in Swift.

In 1961 this Court said, System Federation No. 91 v. Wright, 364 US 642, 647-48 (1961):

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been

> decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., supra, at 114-115. A balance must be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances.
>
> Where there is such a balance of imponderables there must be wide discretion in the District Court.

In that case this Court granted modification of a consent decree where a statute upon which the decree in part was based was amended to permit a union shop, which previously had been prohibited. The Court did not invoke Swift's reference to a "grievous wrong evoked by new and unforeseen conditions."

In United States v. United Shoe Machinery Corp., 266 F Supp 328, 330 (D Mass, 1967), a District Court, hearing a modification request by the government in a

civil antitrust case, held that under Swift it could modify the injunction only upon finding "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." This Court reversed, stating that nothing in Swift precluded the relief sought. 391 US 244, 248 (1961). This Court said of Swift, id. (emphasis in original):

> After reviewing the evidence, [this] Court concluded that the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade. The Court's language, quoted and relied on by the trial court here, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change," [286 US] at 119, the decree, must, of course, be read in light of this context. Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of

> the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

This Court then held, citing Swift and Chrysler, that the District Court had not merely power, but in fact the duty, to modify its original decree if the decree had not achieved its purpose of restoring workable competition in the defendant's industry. 391 US at 251-52.

Finally, just this year this Court held Swift inapplicable in a class-action civil rights case, Board of Education v. Dowell, ___ US ___, 111 S Ct 630 (1991). In that case the District Court had vacated a school desegregation injunction on the ground that the school district had come into compliance with the Constitution, but the Court of Appeals had reversed on the ground that the school district had not shown that the injunction had caused it "'grievous wrong evoked by new and unforeseen conditions,'"

Dowell v. Board of Education, 890 F2d 1483, 1490 (10th Cir, 1989) (quoting United States v. Swift & Co., supra, 286 US at 119). This Court reversed and remanded. Swift was dismissed as irrelevant because the defendants there had attempted for a decade to frustrate operation of the decree ab initio and it was in that context that this Court said that the defendants could be granted modification only upon a showing of a "grievous wrong evoked by new and unforeseen conditions." 111 S Ct at 636. This Court also repeated United Shoe's observation that Swift had held that "'Swift teaches ... a decree may be changed upon an appropriate showing, and it holds that it may not be changed ... if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.'" Id. (quoting United States v. United Shoe Machinery Corp., supra, 391 US at 248).

This Court then stated that the purposes of a school desegregation litigation are "'fully achieved'" when the school district is operated in compliance with the Constitution and it is unlikely that the school board would return to its former, unconstitutional ways. 111 S Ct at 636-37.

This Court also found in Dowell that considerations "based on the allocation of powers within our federal system" also demonstrate that Swift is irrelevant to injunctions in school desegregation cases. This Court stated that the legal justification for school desegregation decrees, a constitutional violation, is removed when school authorities have operated in compliance with the Constitution for a reasonable period of time and that "'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory

control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" 111 S Ct at 637 (quoting Spangler v. Pasadena City Board of Education, 611 F2d 1239, 1245 n.5 [9th Cir, 1979] [Kennedy, J., concurring] [citation omitted]).

In sum, we quoted from the preceding cases at such length because we believe that it is surprising, considering the language of Swift and this Court's subsequent observations about Swift, that the lower federal courts ever entertained the notion that the "grievous wrong" "standard" of Swift would apply to every request for modification of an injunction in the federal Courts. Dowell should go some of the distance required to dispel this notion, but that case involved only the question of vacatur of an injunction on the ground that its remedial purposes have been achieved

and not the question of whether Swift applies to a request for modification of an injunction. We respectfully submit that in this case this Court should make plain that the "grievous wrong" language of Swift is limited to cases like Swift, i.e., those involving "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change," 286 US at 114, and has no relevance in federal class-action civil rights litigation involving remedial injunctions directed at public agencies charged with the formidable responsibility of operating, for example, a large urban police force, housing for thousands of mentally retarded children or a jail for pretrial detainees in a large city.

(B)

We therefore respectfully suggest that this Court should hold in this case that

modification of a permanent injunction in a federal class-action civil rights lawsuit will lie whenever there has been a material change in either (1) the relevant facts or (2) the applicable law. This Court applied such a standard in System Federation No. 91 v. Wright, supra, 364 US at 647, when it said:

> There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.

The Fourth Circuit Court of Appeals has stated explicitly that this is the standard for class-action civil rights cases. Plyler v. Evatt, supra, 846 F2d at 211; Nelson v. Collins, supra, 659 F2d at 424. Whether a particular request for modification should be granted in a particular case depends, of course, on the facts of that case and is a question for the District Court to answer in

the exercise of its discretion. Browder v. Director, 434 US 257, 263 n.7 (1978).

There is a third circumstance, however, in which modification should lie. This circumstance has been described as: when the injunction fails to accomplish the intended result, United States v. United Shoe Machinery Corp., supra, 391 US at 249; when "the remedy is not working effectively or is unnecessarily burdensome," New York State Association for Retarded Children v. Carey, 706 F2d 956, 970 (2d Cir) (quoting Fiss, The Supreme Court -- 1978 Term -- Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 49 [1979]), cert. denied, 464 US 915 (1983); "when unforeseen obstacles present themselves [or] a better understanding of the problem emerges," id. at 969; when the injunction proves unworkable on a better appreciation of the facts, Fortin v. Commissioner, 692

F2d 790, 800 (1st Cir, 1982); and when the District Court identifies "a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, [sic] or because circumstances and conditions have changed which warrant fine-tuning the decree," Heath v. DeCourcey, supra, 888 F2d at 1109.

An example of this third circumstance is found in New York State Association for Retarded Children v. Carey, supra, 706 F2d 956. The District Court previously had held unconstitutional the conditions at Willowbrook, a large State-run home for retarded children in New York City. Id. at 958. In 1975 the State entered into a consent decree requiring that Willowbrook be closed and its residents be placed in facilities of 10 or 15 beds each. Id. at 959.

In attempting to implement this decree, the State found that the housing shortage in New York City would have rendered facilities of that size prohibitively expensive. Id. at 965-66. The State sought modification of the decree in order to permit facilities of up to 50 beds each. At the hearing on the motion the State produced expert witnesses who testified that facilities of the size contemplated by the original decree would not be appropriate for the health and psychological well-being of the children. Id. at 966. The plaintiffs opposed the motion for modification and produced expert witnesses who controverted the State's witnesses. Id. at 966-67. At the time of the hearing 2400 of Willowbrook's 5700 residents were still at Willowbrook or in other large facilities. Id. at 958, 965. The District Court, for the most part, denied modification. Id. at 960, 967.

The Court of Appeals for the Second Circuit reversed. The Court recognized that the smaller facilities called for by the original decree would have been prohibitively expensive and concluded that the District Court's denial of the motion inappropriately placed the objective of smaller facilities ahead of the closing of Willowbrook, the objective of the entire lawsuit. Id. at 965-66, 967. In short, the Court of Appeals took into account every relevant fact and circumstance, including the facts that the resources available were limited and that public agencies such as that involved in that case operate in what the Court of Appeals called a "complex environment." Id. at 966. Had the Court of Appeals taken a stricter view of the showing required for modification, it might have held that neither the housing shortage nor the State's experts' testimony constituted changed circumstances

of fact. However, by taking a pragmatic view of the situation the Court of Appeals reached a result that, we submit, was the best result in light of the numerous interests at stake.

This third ground on which modification may be granted, a better understanding of how to remedy the situation addressed, can be found outside the context of federal class-action civil rights litigation. For example, we submit that the modifications in Chrysler Corp. v. United States, supra, 316 US 556, and United States v. United Shoe Machinery Co., supra, 391 US 244, are better described as based on this ground than on changed circumstances of law or fact.

It is in federal class-action civil rights litigation, however, that this ground will arise more often and will more often supply a basis for modification. While we do not

attempt to excuse violations of constitutional or federal statutory rights, the public agencies that are the defendants in such litigation have limited resources and face difficult tasks in complex legal environments. Even more significant is the fact that they have little control over the factors that are the most important in defining the nature and magnitude of the problems that those agencies address. For example, in the present case, as we understand it, the Sheriff is charged with the responsibility of housing Suffolk County's criminal defendants who do not make their bail. The number of such persons is the product of at least the following: the number of persons arrested and the number and nature of the crimes they committed; what crimes they are charged with; the amount of bail set; the number of defendants who can post their bail; the length of time from arraignment to

trial; the length of trial; the number of persons convicted; the number of persons who plead guilty; the length of time from conviction or plea to sentencing; and the length of time from sentencing until transfer to the State prison system. The Sheriff has no control over any of these factors. And to say that the Sheriff has limited resources is an understatement: the Sheriff was forced to sue the Mayor and City Council for the funds to construct the New Jail some eleven years after the District Court had held unconstitutional the conditions at the Charles Street Jail.

One other factor leads, as a general matter, to the conclusion that in federal class-action civil rights litigation modification often will be appropriate when experience has yielded a better understanding of how to remedy the violation at issue. That factor is the interest of third parties not before the

District Court and of the public in general. Cases involving overcrowding of jails and prisons provide perhaps the best examples; undoubtedly, if population caps lead to the release of individuals who otherwise would not have been released, at some point the population cap will thus indirectly lead to someone becoming the victim of a crime that otherwise would not have been committed. Again, we do not claim that this fact would excuse a constitutional violation: the point is that there will be parties who will not submit papers on a modification motion but whose interests the District Court should consider. See generally Heath v. DeCourcy, supra, 888 F2d at 1110; Plyler v. Evatt, supra, 846 F2d at 211-14; Duran v. Elrod, 760 F2d 756, 759, 760-61 (7th Cir, 1985). And the public interest is implicated, by definition, by every injunction in a class-action civil rights case.

It may be argued that the standard we propose, that modification will lie, in the discretion of the District Court, whenever there is a material change of fact or law or experience provides a better understanding of the best way to remedy the violation, is too flexible. However, the fact that the standard is a flexible one does not mean that modification will be too freely granted. For example, in Benjamin v. Malcolm, 564 F Supp 668 (SDNY, 1983), the City moved for an increase in the population caps at two facilities for detainees. The District Court noted that changes of fact and law are to be viewed "'with generosity,'" id. at 686 (quoting New York State Association for Retarded Children v. Carey, supra, 706 F2d at 971), but denied the motion.

Moreover, the flexibility of such a standard is mandated by the very nature of equitable relief. Every injunction involves

an element of prediction, at least a prediction that the injunction will remedy the violation. See Philadelphia Welfare Rights Organization v. Shapp, 602 F2d 1114, 1120 (3d Cir, 1979), cert. denied, 444 US 1026 (1980). No one would suggest that the District Court must stand by that prediction no matter what the future reveals. To the contrary, every time a District Court is asked to modify an injunction it should consider all the relevant facts and circumstances and justify, at least to itself, the continuation of the injunction's intrusion into the affairs of the parties and of the injunction's effect on parties not before the Court. System Federation No. 91 v. Wright, supra, 364 US at 649.

POINT II

SEVERAL ARGUMENTS THAT PLAINTIFFS OFTEN RAISE IN OPPOSITION TO MODIFICATION REQUESTS DO NOT WITHSTAND ANALYSIS.

(A)

Respondents can be expected to argue that modification should be more difficult for defendants to obtain when the injunction is the product of a consent decree rather than litigation. But this Court has held that the showing required is identical, System Federation No. 9 v. Wright, supra, 364 US at 650-51; United States v. Swift & Co., supra, 286 US at 114-15, and that holding undoubtedly is correct. A consent decree in a federal class-action civil rights case is "no mere contract." Duran v. Elrod, supra, 760 F2d at 760. As this Court has stated, the parties may not, by giving each other consideration, purchase an injunction from the District Court. System Federation No. 9

v. Wright, supra, 364 US at 651. And once a consent decree is entered, the plaintiffs may not exercise "veto power" over a defendant's request for modification based on changed law or facts or a better understanding of how to remedy the violation at issue. It is the District Court who must weigh the circumstances, including the interests of third parties and the public, and decide whether the injunction should continue as entered or be modified.

Moreover, if it is more difficult for defendants to obtain modification of consent decrees than of litigated injunctions, defendants will have a substantial incentive not to enter into consent decrees. But everyone seems to agree that, as a general matter, consent decrees are a good thing: they not only spare the parties and the District Court the time and expense of a trial, or at least a hearing on the remedy,

but also they permit the parties to choose the remedy from the many possible remedies for the violation found. Thus, if the standard for modification of consent decrees is too strict, defendants will forego the opportunity to negotiate a solution that minimizes the remedy's cost to them and interference with their operation and plaintiffs would be deprived of the opportunity to bargain for the remedy they most desire.

Therefore, the fact that a particular injunction was the product of consent and not of litigation is merely one circumstance to be considered on a defendant's motion for modification. Certainly, defendants may not sign a consent decree and seek modification as soon as the ink is dry. And plaintiffs will not fail to call to the attention of the District Courts the fact that the defendant agreed to the obligation it seeks to modify.

To the contrary, the more probable danger is that the District Courts will give too much weight to this circumstance. That happened here: the District Court's analysis under the "flexible" standard and under subsection 6 of Rule 60(b) mentions no circumstance other than the fact that the Sheriff had agreed to single-celling (App. 12a-13a). See also System Federation No. 91 v. Wright, supra, 364 US at 645-46 (District Court denied modification primarily because injunction had been entered on consent; Court of Appeals affirmed; this Court reversed); Plyler v. Evatt, supra, 846 F2d at 212.

(B)

Respondents also can be expected to argue that plaintiffs will not enter into consent decrees if it is too easy for defendants to obtain modification. The short answer to this argument is that defendants

will not enter into consent decrees if it is too difficult for defendants to obtain modification when material facts or law change or experience yields a better understanding of how to remedy the violation at issue. Duran v. Elrod, supra, 760 F2d at 762; Philadelphia Welfare Rights Organization v. Shapp, supra, 602 F2d at 1120. Resolution of these arguments is simple: if the standard for modification is known in advance, both plaintiffs and defendants can intelligently choose whether to settle or litigate.

(C)

Respondents probably will argue also that the Sheriff's "good faith," and the question of whether the increase in the number of detainees was "foreseeable," are relevant to this motion. But no one can see into the future and every injunction is addressed to the facts and law existing at

the time of its issuance. System Federation No. 91 v. Wright, supra, 364 US at 652; United States v. Swift & Co., supra, 286 US at 115. It is true that any change in law or fact that was contemplated at the time the injunction was issued will not, in the usual case, constitute grounds for modification. However, when the changed circumstance was not contemplated, we submit that the questions of whether the defendant acted in "good faith," and whether the change was "foreseeable," are of little significance. Modification may be appropriate even where it could be argued that the defendant made a mistake about the facts or failed to foresee something that should have been foreseen.

Again, New York State Association for Retarded Children v. Carey, supra, 706 F2d 956, provides a fine example. It could have been argued that the State should have foreseen that because of the New York City

housing market the cost of the smaller facilities would be prohibitive and thus the State's agreement to smaller facilities was mistaken. But the question of the State's mistake vel non paled in comparison to factors such as the prohibitive expense of smaller facilities, the need to empty Willowbrook, and the interests of third parties such as the families of the retarded children. In addition, given that the plaintiffs also signed the consent decree, it would seem that they were equally guilty of failing to foresee that smaller facilities would be prohibitively expensive.

Defendants such as public agencies should not be "punished" for failing to foresee some change; the interests of third parties always will be superior to a perceived need to "punish" a defendant. Duran v. Elrod, supra, 760 F2d at 762; Phildelphia Welfare Rights Organization v.

Shapp, supra, 602 F2d at 1121. Any punishment necessary can be dispensed through the contempt power.

Thus, the question should be whether the change was contemplated in fact and not whether, in hindsight, it was foreseeable. In all but the exceptional case the questions of whether the defendant acted in good faith and whether some change was foreseeable can only distract the parties and the District Court from the question of whether the modification sought would be better on the whole, considering the interests of the plaintiffs, the defendant, third parties and the public, than continuing the injunction without change.

(D)

Plaintiffs also may argue that modification should be granted only when the modification sought would further the purpose of the injunction. Upon analysis,

this argument is irrelevant. Certainly, if an obligation of an injunction comes to provide no benefit to the plaintiffs, there is no longer a reason for the District Court to interfere in the affairs of the defendant agency in that particular. See Procunier v. Martinez, 416 US 396, 404-05 (1974). Thus, modification should lie in that circumstance even though relieving the defendant of that obligation could not be said to further the purpose of the injunction.

Asking whether the proposed modification furthers the purpose of the injunction simply does not aid in deciding a defendant's motion for modification. If the injunction was the product of litigation, the purpose of the injunction was to remedy the violation without unnecessary burdens on the defendant, non-parties or the public. See Procunier v. Martinez, supra, 416 US at 404-05. If the proposed modification would

decrease the burden on the defendant without decreasing the injunction's effectiveness in curing the violation, or if the modification would increase the efficiency of the defendant's operation, thereby providing the defendant with more resources to apply to curing the violation in other ways, the District Court should not be foreclosed from granting modification simply because the modification would not by itself directly contribute to curing the violation. See generally Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986). Modification also should lie when it would decrease a burden on the public, such as the risk of victimization created if the injunction would result in the release of detainees or convicted criminals. See Heath v. DeCourcy, supra, 888 F2d at 1110; Plyler

v. Evatt, supra, 846 F2d at 211-14; Duran v. Elrod, supra, 760 F2d at 760-61.

If the injunction at issue was entered on consent, as it was here, it is meaningless to even speak of the purpose of the injunction. As this Court has stated, United States v. Armour & Co., 402 US 673, 681 (1971) (footnote omitted) (emphasis in original):

> Thus [a consent] decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

The Courts below in this case made the mistake of attempting to consider the "purpose" of the consent decree. The District Court stated, "The proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County

pretrial detainees that meet agreed-upon standards" (App. 12a). This reasoning would mandate denial of every motion for modification of a consent decree. Plaintiffs were entitled to negotiate for single-celling in the New Jail but entering into a consent decree did not give them "veto power" over any request for modification of the resulting District Court injunction.

United Shoe and Dowell do state that Swift holds that an injunction may not be "changed" in the interests of the defendants if the purposes of the injunction have not been fully achieved. 364 US at 647-48; 111 S. Ct. at 636. However, both of those cases involved attempts to vacate, not modify, injunctions and those statements must be read in that context. Moreover, if taken literally, that holding would mean that no modification could ever be made because once an injunction's purpose has been fully

achieved, there no longer is a reason for the District Court to retain jurisdiction over the case.

CONCLUSION

THIS COURT SHOULD HOLD THAT MODIFICATION OF A PERMANENT INJUNCTION IN A FEDERAL CIVIL RIGHTS CLASS ACTION WILL LIE, IN THE DISTRICT COURT'S DISCRETION, WHENEVER THERE HAS BEEN A MATERIAL CHANGE OF LAW OR FACT OR EXPERIENCE WITH THE FACTS HAS PROVIDED THE COURT WITH A BETTER UNDERSTANDING OF HOW TO REMEDY THE VIOLATION ADDRESSED. THIS COURT SHOULD THEN REVERSE THE COURT OF APPEALS' ORDER AND REMAND FOR FURTHER PROCEEDINGS.

Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel of
The City of New York,
Attorney for Amicus Curiae
The City of New York.

LEONARD J. KOERNER,*
FAY LEOUSSIS,
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

*Counsel of Record.